

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 17, 2001 Session

STATE OF TENNESSEE v. LARRY ELDON SHANNON

Direct Appeal from the Circuit Court for Rutherford County
No. F-46541 J. Steve Daniel, Judge

No. M2000-00985-CCA-R3-CD - Filed July 27, 2001

The Defendant, Larry Shannon, was convicted by a jury of misapplication of contract funds, a Class E felony, and making a harassing telephone call, a Class A misdemeanor; he was acquitted of theft of property in an amount over \$10,000. The trial court sentenced the Defendant as a Range I, standard offender to eighteen months for the misapplication of contract funds conviction. The Defendant was ordered to serve ninety days in jail, with the remainder to be served on probation. The Defendant was also sentenced to eleven months, twenty-nine days for the harassing telephone call conviction, to be served on probation. In this appeal as of right, the Defendant raises the following issues for our review: (1) whether Tennessee Code Annotated § 66-11-140 unconstitutionally shifts the burden of proof to the defendant; (2) whether the evidence was sufficient to support the Defendant's convictions; (3) whether the trial court erred by permitting the State to mention bad checks written by the Defendant; and (4) whether the trial court erred by enhancing the Defendant's sentence and by denying judicial diversion. We hold that the Defendant waived any issue he had regarding a shift in the burden of proof by not presenting the issue to the trial court and that the use of the presumption set forth in the statute does not constitute plain error. We further hold that the evidence was sufficient to support the Defendant's convictions, that the trial court did not err by permitting the State to mention bad checks, and that the trial court did not err in sentencing the Defendant. Accordingly, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Calvin P. Turner, Lebanon, Tennessee; and Thomas F. Bloom, Nashville, Tennessee, for the Appellant, Larry Eldon Shannon.

Paul G. Summers, Attorney General and Reporter; David H. Findley, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Paul A. Holcombe, III, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The proof at trial established that in 1997, the Defendant and Randy Chambless agreed to start a construction company, which they named Quality Unlimited, LLC. As evidenced by the name of the company, Quality Unlimited was a limited liability company. The Defendant was listed as the president of Quality Unlimited. Mr. Chambless was to be in charge of giving estimates on projects, entering into contracts, and hiring subcontractors for a particular job. The Defendant was to be in charge of executing the projects and supervising the actual construction work. According to Mr. Chambless, the Defendant was also to be in charge of handling the books; however, both the Defendant and Mr. Chambless had authority to write checks on behalf of the company. While Mr. Chambless did write some checks on behalf of the company, the Defendant wrote the majority of the checks. In November 1997, Mr. Chambless left Quality Unlimited, leaving the Defendant as the sole member. The Defendant ceased operating Quality Unlimited in 1998, and he formed a new construction company called Eagle One Construction. At the time of the trial, the Defendant was doing business as Eagle One Construction, which is also a limited liability company.

In the summer and fall of 1997, Mr. Chambless entered into several contracts obligating Quality Unlimited to perform work on the Hampton Inn in Murfreesboro, Tennessee. The work performed on the Hampton Inn included minor renovations to some of the individual rooms, work on the pool house and vending rooms, re-paving the parking lot, repairing the walkways and sidewalks, and renovating the lobby. Work was performed by Quality Unlimited on the Hampton Inn from around August 1997 to December 1997. Shortly after Christmas in December 1997, the Defendant was fired by the Hampton Inn. The lobby renovations were not complete at that time.

Bryan Nearn, the manager of Murfreesboro InnKeepers, LLC, a company which owns the Hampton Inn in Murfreesboro, Tennessee, testified that he hired Quality Unlimited to do some remodeling work at the Hampton Inn in Murfreesboro. Mr. Chambless negotiated with Mr. Nearn regarding the re-paving of the parking lot, and the parties agreed that Quality Unlimited would perform the work for \$27,629.74. Mr. Chambless subcontracted with APAC Paving, Inc., for APAC to perform the actual work for \$21,270. The contract provided that the hotel would pay fifty percent of the contract price up front and fifty percent upon completion of the job. On September 11, 1997, the hotel issued a check to Quality Unlimited for \$13,814.87, which was one-half of the contract price. Another check was issued for the same amount to Quality Unlimited on October 24, 1997, to pay for the outstanding balance on the parking lot. However, Quality Unlimited never paid any money to APAC for performing the work on the parking lot. The bank records for Quality Unlimited revealed that all of the money received for the paving job was spent, but none of the money went towards paying APAC for its work. Mr. Nearn testified that APAC filed a lien against the property in April 1998, and he ultimately had to pay APAC for the work performed on the parking lot. The Defendant admitted that he never paid APAC out of the money paid to Quality Unlimited for the paving of the parking lot, but he asserted that the money went to pay legitimate business expenses. Those expenses included office expenses like the electric bill, labor and materials for other jobs not related to the Hampton Inn, and labor and materials for other jobs at the Hampton Inn. The Defendant asserted that he did not believe he was doing anything wrong by paying those legitimate

business expenses with the money. Mr. Chambless also testified that he did not think the company was doing anything wrong by paying legitimate business expenses with the money.

According to Mr. Nearn, the total amount that the hotel agreed to pay for all of the work contracts, including the paving job, was \$144,000. However, due to some changes on the lobby contract, the amount was reduced to \$138,000. The total amount paid to Quality Unlimited was \$127,174.97. Mr. Nearn testified that at the time Quality Unlimited was fired, \$19,000 worth of the remodeling work remained incomplete. Mr. Nearn also testified that he had to spend additional money to have the project completed by other individuals. Mr. Nearn believed that the Defendant owed him money because he had paid the Defendant more money than he should have for the work that was completed and because he had to pay subcontractors for work for which the Defendant had already been paid.

Joe Janos and Buddy Ogles, two subcontractors who performed work on the Hampton Inn for Quality Unlimited, both testified that they had not received payment from the Defendant. Mr. Janos testified that he contracted with the Defendant to do carpet and tile work in the lobby of the Hampton Inn in exchange for approximately \$10,740. He received only \$1,000 in payment from the Defendant. Because he had to satisfy his monetary obligations for the labor and materials for the Hampton Inn out of his operating capital, Mr. Janos was forced out of business. Mr. Janos also suffered marital problems because of the financial strain. Mr. Janos received a civil judgment against Quality Unlimited for the money he was owed, but he never received payment. Similarly, Mr. Ogles contracted with Quality Unlimited to perform electrical work on the Hampton Inn. The original contract price was \$12,347. On December 18, 1997, Mr. Ogles received a check signed by the Defendant in the amount of \$3,235.90. However, he was unable to cash the check because of insufficient funds in Quality Unlimited's bank account. Mr. Ogles testified that the Hampton Inn paid the second half of his contract price and that he was awarded a civil judgment against Quality Unlimited for the first half. Nevertheless, he never received any money from the Defendant or Quality Unlimited.

Stella Howard, the hotel manager, testified that the parties met in December of 1997 to discuss the construction project at the Hampton Inn. At that time, Mr. Nearn informed the Defendant that he wanted to be reimbursed for what he felt the Defendant owed him, and the Defendant stated that if Mr. Nearn filed civil charges against him, "he would file bankruptcy and he would be opened under a different company the very next day and we would never get a penny back." Ms. Howard also testified that on June 28, 1998, after the Defendant had learned of the criminal warrants out against him, the Defendant called the hotel and spoke to her. According to Ms. Howard, the Defendant told her that "if this doesn't stop, someone's going to get hurt." Ms. Howard said that she asked the Defendant if that was a threat, and he replied that it was. Ms. Howard was upset by the phone call, and she had a security system installed in her house as a result. Bruce Neal, another employee of the Hampton Inn, confirmed the substance of Ms. Howard's conversation with the Defendant. Ms. Howard had the Defendant on the speaker phone so that Mr. Neal could hear the conversation.

The Defendant admitted calling Ms. Howard in June of 1998, but he asserted that he never threatened her. He also asserted that he never intended to defraud the Hampton Inn. While he admitted that APAC, Mr. Janos, and Mr. Ogles were never paid for the work they performed, he claimed that the failure to pay was due to severe cash flow problems caused by Mr. Chambless and the Hampton Inn. Mr. Chambless and Mr. Nearn negotiated the lobby renovation contract price down to \$64,000, and the Defendant asserted that the contract price should have been around \$90,000; thus, the contract was underbid. Also, the Defendant testified that the scheduling of labor became a major problem. Because the hotel refused to inconvenience its guests, there were times when the employees were not allowed to work. The Defendant asserted that there were often times when the employees were forced to stand around and do nothing, leading to increased labor costs. According to the Defendant, Ms. Howard promised to pay for the wasted labor time, but she failed to do so.¹ Also, the Defendant testified that the hotel ordered a substantial amount of extra work for which it failed to pay.² According to the Defendant, these extra expenses caused Quality Unlimited to have problems meeting its payroll. The Defendant testified that while he borrowed money from his girlfriend to pay his employees, Mr. Chambless never offered any of his own money to help meet obligations. Instead, when things got difficult, Mr. Chambless left the company, leaving the Defendant to deal with his mess. The Defendant claimed that he had spent \$154,926.19 on all of the projects at the Hampton Inn -- much more than the \$127,174.97 that he received in payment.³ He admitted that he told Mr. Nearn and Ms. Howard in a meeting that they would have a hard time getting any money out of his company, but he asserted that his statement was made in a moment of anger and frustration. He believed that the Hampton Inn owed him a substantial sum of money, while the Hampton Inn believed that he owed it money. Pursuant to his calculations, the Defendant believed that the Hampton Inn owed him \$46,000.

The Defendant testified that when he heard that the Hampton Inn had taken out criminal warrants against him, he turned himself in to the Rutherford County Sheriff's Department. While the Defendant maintained that he never intended to defraud anyone, he asserted that if he did do anything wrong, Randy Chambless was just as culpable as he was.

CONSTITUTIONALITY OF STATUTE

The Defendant asserts for the first time on appeal that the statutes under which he was convicted of misapplication of contract payments unconstitutionally shift the burden of proof to the defendant. Generally, the appellate courts will not consider issues that are not properly preserved

¹Ms. Howard admitted that she would not permit the employees to jackhammer at 7:00 in the morning, but she said there were other projects for the employees to do; therefore, there was no reason for employees to be standing around doing nothing.

²Mr. Nearn denied that the Hampton Inn ordered any extra work not covered by the original contract price. He explained that there were some changes, but there were both additions and deletions, which cancelled each other out.

³The Defendant's figure of \$154,926.19 included business operating expenses, such as rent, utilities, advertising, insurance, and taxes.

at the trial court level. See State v. Adkisson, 899 S.W.2d 626, 636 (Tenn. Crim. App. 1994); Tenn. R. App. P. 3(e), 36(a). However, the Defendant asserts that we can address this issue on appeal because it constitutes plain error. Pursuant to Tennessee Rule of Criminal Procedure 52(b), “[a]n error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice.” In State v. Adkisson, 899 S.W.2d 626 (Tenn. Crim. App. 1994), this Court set forth the following prerequisites for finding “plain error”:

- (a) the record must clearly establish what occurred in the trial court;
- (b) a clear and unequivocal rule of law must have been breached;
- (c) a substantial right of the accused must have been adversely affected;
- (d) the accused did not waive the issue for tactical reasons; and
- (e) consideration of the error is “necessary to do substantial justice.”

Id. at 641-42 (footnotes omitted). Our supreme court formally adopted this test in State v. Smith, 24 S.W.3d 274 (Tenn. 2000), emphasizing that all five factors must be established before plain error will be recognized. Id. at 282-83. After a thorough review of the record and the applicable law, we conclude that the plain error rule will provide the Defendant no relief because a clear and unequivocal rule of law was not breached.

The statute under which the Defendant was convicted provides as follows:

Any contractor, subcontractor, or other person who, with intent to defraud, uses the proceeds of any payment made to that person on account of improving certain real property for any other purpose than to pay for labor performed on, or materials furnished by that person’s order for, this specific improvement, while any amount for which such person may be or become liable for such labor or materials remains unpaid, commits a Class E felony.

Tenn. Code Ann. § 66-11-138. Additionally,

Such use of the proceeds mentioned in §§ 66-11-137 -- 66-11-139 for any purpose other than the payment of such unpaid amount shall be prima facie evidence of intent to defraud.

Id. § 66-11-140. The Defendant asserts that this last provision unconstitutionally shifts the burden of proof to the defendant by requiring the defendant to prove that he or she did not intend to defraud. He argues that the use of this statute constitutes plain error because it violates a clear and unequivocal rule of law and because the remainder of the Adkisson factors were satisfied. We cannot agree.

In Daugherty v. State, 393 S.W.2d 739 (Tenn. 1965), our supreme court considered a challenge to the constitutionality of this statute and upheld it as constitutional. See id. at 743-44. Nevertheless, the Defendant asserts that the Daugherty decision was rendered invalid by the United States Supreme Court’s decision in Sandstrom v. Montana, 442 U.S. 510 (1979), and the cases that followed. In Sandstrom, the Supreme Court struck down a jury instruction because the instruction created a mandatory inference which shifted the burden of proof regarding the defendant’s intent to the defendant in violation of the Fourteenth Amendment’s requirement that the State prove every element of a criminal offense beyond a reasonable doubt. See id. at 512-15. The Defendant asserts

that the statute at issue here creates such an unconstitutional mandatory inference. However, we find that the statute instead creates a permissive inference which does not unconstitutionally shift the burden of proof to the defendant.

In Ulster County Court v. Allen, 442 U.S. 140 (1979), the Supreme Court recognized that evidentiary inferences and presumptions “are a staple of our adversary system of factfinding.” Id. at 156. Notwithstanding, a presumption or inference “must not undermine the factfinder’s responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.” Id. The Court explained,

The most common evidentiary device is the entirely permissive inference or presumption, which allows -- but does not require -- the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. In that situation the basic fact may constitute prima facie evidence of the elemental fact. When reviewing this type of device, the Court has required the party challenging it to demonstrate its invalidity as applied to him. Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the “beyond a reasonable doubt” standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

A mandatory presumption is a far more troublesome evidentiary device. For it may affect not only the strength of the “no reasonable doubt” burden but also the placement of that burden; it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. In this situation, the Court has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide. To the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption’s constitutional validity is logically divorced from those facts and based on the presumption’s accuracy in the run of cases.

Id. at 157-59 (citations omitted) (first emphasis added). In determining the type of inference or presumption involved in a case, the jury instructions will generally be controlling. Id. at 157 n.16.

Our supreme court has emphasized that [w]hen a jury is instructed concerning a permissive inference, the instructions should make clear that the jury may, but need not, draw the inference suggested by the statute, regardless of whether there is any evidence in the record to rebut the connection between the proved and the presumed facts.

State v. Bryant, 585 S.W.2d 586, 589-90 (Tenn. 1979). Our appellate courts have consistently refused to hold that statutes which set forth evidentiary presumptions or inferences are unconstitutional per se; rather, the courts have looked to the jury instructions to determine whether the jury was instructed on a permissive or mandatory presumption or inference.⁴ See id.; Lowe v. State, 805 S.W.2d 368, 372 (Tenn. 1991); State v. Bolin, 678 S.W.2d 40, 41-43 (Tenn. 1984); State v. Merriweather, 625 S.W.2d 256, 257-58 (Tenn. 1981); State v. Bonam, 7 S.W.3d 87, 89-90 (Tenn. Crim. App. 1999); State v. Woodson, 705 S.W.2d 677, 679-80 (Tenn. Crim. App. 1985). According to our supreme court, “in order to pass constitutional muster, . . . an instruction given to the jury pursuant to the statute would have to be phrased in terms of a permissive inference.” Lowe, 805 S.W.2d at 372.

The jury in this case was instructed as follows regarding the presumption:
Now, Tennessee Code Annotated 66-11-140, entitled unlawful use of funds is prima facie evidence of intent to defraud, states as follows: Such use of the proceeds mentioned in Tennessee Code Annotated 66-11-137 through 139 for any purposes other than the payment of such unpaid amount shall be prima facie evidence of an intent to defraud. Prima facie evidence is define[d] as evidence good and sufficient on its face. Such evidence as in the judgment of the law is sufficient to establish a given fact or the group or chain of facts constituting a party’s claim or defense, and which if not rebutted or contradicted would remain sufficient.

A person acts intentionally when that person acts with a conscious objective or desire, either one, to cause a particular result; or two, to engage in particular conduct. Intent to defraud may be inferred by the use of the proceeds for any purpose other than the payment of such unpaid amount.

The Court has charged the jury concerning an inference that the jury may make in regard to certain evidence in this case; however, the jury is not required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by all of the evidence in the case warrant the inference which the law permits the jury to draw. The inference may be rebutted by direct or circumstantial evidence or both, whether it exists in the evidence of the State or as offered by the defendant.

Although the defendant is not required by law to do so, when the defendant offers an explanation to rebut the inference raised, you should consider such

⁴The Defendant relies solely on the language of the statute for his argument that the statute creates an unconstitutional mandatory presumption. He then relies upon a decision by the Eleventh Circuit Court of Appeals which found a Florida statute, similar to the one at issue here, to be unconstitutional. See Miller v. Norvell, 775 F.2d 1572, 1574 (11th Cir. 1985). We note that a decision of the Eleventh Circuit Court of Appeals interpreting a Florida statute is not binding on this Court. We therefore choose to follow the example of the appellate courts of this State and look to the jury instructions, rather than solely to the language of the statute itself, to determine whether any unconstitutional burden shifting occurred in this case.

explanation along with all of the evidence to determine not only the correctness of the inference, but also the reasonableness of the defendant's explanation. You are not bound to accept either the inference or the defendant's explanation.

The State must prove beyond a reasonable doubt every element of the offense before the defendant can be found guilty. (Emphasis added). From these instructions, it is clear that the jury was instructed regarding a permissive, rather than a mandatory, presumption. Because the jury was not required to find the elemental fact upon proof of the basic fact, the presumption was not a mandatory presumption which unconstitutionally shifted the burden of proof to the defendant. Accordingly, the use of the presumption did not violate a clear and unequivocal rule of law, and it therefore does not constitute plain error. This issue has no merit.

SUFFICIENCY OF THE EVIDENCE

The Defendant asserts that the evidence presented at trial was insufficient to support his convictions. When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956); State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas, 286 S.W.2d at 859. This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. Id.

The Defendant was convicted of misapplication of contract payments, which makes it a felony for a contractor to, "with intent to defraud, use[] the proceeds of any payment made to that person on account of improving certain real property for any other purpose than to pay for labor performed on, or materials furnished by that person's order for, this specific improvement, while any amount for which such person may be or become liable for such labor or materials remains unpaid." Tenn. Code Ann. § 66-11-138. Additionally, the use of any contract funds paid to a contractor for

improvement to certain real property “for any purpose other than the payment of such unpaid amount shall be prima facie evidence of intent to defraud.” Id. § 66-11-140. Our supreme court has maintained that the statute “is intended to make the payments to the contractor trust funds for the payment of labor and materials, and to afford protection against contractors who receive money for construction or repair of buildings and divert it to other uses prior to payment of claims for labor, materials, or other charges in connection with the work on the buildings.” Daugherty v. State, 393 S.W.2d at 739, 741 (Tenn. 1965).

The proof is undisputed that Randy Chambless entered into contracts on behalf of Quality Unlimited, a limited liability company, to perform construction work on the Hampton Inn in Murfreesboro, Tennessee. The Defendant was to be responsible for executing that work. He accepted payments for specific work done on the hotel but did not apply those payments to the specific materials or labor used to perform the work. Although the Defendant received complete payment from the hotel for paving the parking lot, he never paid APAC Paving, which performed the job. Instead, he used the money to pay for recurring office expenses such as the electric bill, for labor and materials for other jobs not dealing with the Hampton Inn, and for labor and materials for other work performed on the Hampton Inn. Also, two other subcontractors, Joseph Janos and Buddy Ogles, performed work on the Hampton Inn, but were not paid. Both subcontractors had received civil judgments against Quality Unlimited, but they had never received payment. According to Stella Howard, in a heated meeting between the Defendant and the hotel management to discuss the differences between the parties, the Defendant stated that if the Hampton Inn tried to sue him, he would declare bankruptcy and reopen his company under a different name. While there was no proof that the Defendant had declared bankruptcy, the Defendant admitted that Quality Unlimited had gone out of business and that he was still in the construction business under a different name. The Defendant did not dispute that he did not use the money received from the hotel to pay the subcontractors. Rather, he contended that he did not intend to defraud the hotel by his use of the funds. He asserted that his failure to pay the subcontractors was attributable to the unforeseen financial difficulties arising from the project. He testified that he did not believe that he was doing anything wrong by spending the money received from the Hampton Inn on legitimate business expenses. Looking at this evidence in the light most favorable to the State, we believe that a rational jury could have concluded that the Defendant used the contract proceeds for purposes other than paying the subcontractors with the intent to defraud. See State v. Patterson, 755 S.W.2d 815, 818 (Tenn. Crim. App. 1984) (finding that State met burden of proving intent to defraud by presenting undisputed evidence that the defendant used the money for purposes other than paying construction costs).

The Defendant was also convicted of making a harassing telephone call. Tennessee Code Annotated section 39-17-308 makes it unlawful for a person to intentionally threaten by telephone “to take action known to be unlawful against any person, and by this action knowingly annoy[] or alarm[] the recipient.” Tenn. Code Ann. § 39-17-308(a)(1). Although the Defendant denied threatening Stella Howard on the telephone, Ms. Howard testified that the Defendant called her at work and stated, “If this does not stop, someone is going to get hurt.” Ms. Howard testified that she asked the Defendant if that was a threat, and he replied, “Yes, it is, because this needs to stop.” Ms.

Howard said that she was very upset about the call and that she had a security system installed in her home as a result of it. Bruce Neal, the guest services manager at the Hampton Inn, testified that he listened to Ms. Howard's conversation with the Defendant because Ms. Howard had the Defendant on the speaker phone. Mr. Neal confirmed that the Defendant threatened Ms. Howard on the phone and that Ms. Howard was alarmed by the call. Looking at the evidence in the light most favorable to the State, the evidence was clearly sufficient to support the Defendant's conviction.

ADMISSION OF EVIDENCE REGARDING BAD CHECKS

The Defendant argues that the trial court erred by permitting the State to elicit testimony relating to returned checks stamped "insufficient funds" as reflected on his bank statement. On the day of the trial, the Defendant filed a motion in limine regarding the issue. However, there is no evidence in the record that the trial court ever addressed or ruled on the motion, and the Defendant asserts that the trial court did not rule on the motion before trial. The State's first witness, Jeff Vaught, a bank officer for Wilson Bank and Trust, testified regarding the bank records for Quality Unlimited. He explained those bank records to the jury, and in doing so, he testified regarding what constituted a debit, a credit, a returned item charge, and the difference between a returned item and an overdraft. In the course of that testimony, he brought some checks marked "insufficient funds" to the attention of the jury. Nevertheless, the Defendant never objected to this testimony or otherwise brought the motion in limine to the attention of the trial court. Failure to make a contemporaneous objection waives consideration by this Court of the issue on appeal. See Tenn. R. App. P. 36(a); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988). Accordingly, we find no error.

SENTENCING

Finally, the Defendant argues that the trial court erred by enhancing his sentence for misapplication of contract funds and by denying him judicial diversion. When a criminal defendant challenges the length, range, or manner of service of a sentence, the reviewing court must conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption, however, "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the event that the record fails to show such consideration, the review of the sentence is purely de novo. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the

potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b), -103(5); State v. Williams, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

The presumptive sentence to be imposed by the trial court for a Class B, C, D or E felony is the minimum within the applicable range unless there are enhancement or mitigating factors present. Tenn. Code Ann. § 40-35-210(c). If there are enhancement or mitigating factors, the court must start at the presumptive sentence, enhance the sentence as appropriate for the enhancement factors, and then reduce the sentence in the range as appropriate for the mitigating factors. Id. § 40-35-210(e). The weight to be given each factor is left to the discretion of the trial judge. Shelton, 854 S.W.2d at 123. However, the sentence must be adequately supported by the record and comply with the purposes and principles of the 1989 Sentencing Reform Act. State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986).

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence "even if we would have preferred a different result." State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). The defendant bears the burden of showing the impropriety of the sentence imposed. Ashby, 823 S.W.2d at 169.

The trial court in this case enhanced the Defendant's sentence for the Class E felony from the minimum sentence of twelve months to a mid-point sentence of eighteen months upon finding two enhancement factors and no mitigating factors.⁵ See Tenn. Code Ann. §§ 40-35-112(a)(5), -210(d). The court determined that the offense involved more than one victim and that the personal injuries or damages to property were particularly great. See id. § 40-35-114(3), (6). The Defendant asserts that the trial court misapplied both enhancement factors. We disagree.

The Defendant argues that Tennessee Code Annotated section 66-11-138 is designed to protect only property owners and moneylenders to such property owners and that only those persons can be considered victims for the purposes of sentencing. He relies on the language of the supreme court in State v. Overton, 245 S.W.2d 188 (Tenn. 1951), which states regarding the statute,

It is common knowledge to all lawyers that over a period of years, and especially during a building boom, there are hardly enough precautions that can be taken by the lender of money or the property owner to protect himself against improper application of funds paid in certain instances to certain unscrupulous contractors or those doing business on a shoe string. It was probably by reason of this fact that the present statute was adopted by the legislature at the instance of the reputable contractors and others of the State.

⁵The court also ordered the Defendant to pay \$41,245 in restitution to the Hampton Inn and a total of \$4,500 in fines for his convictions. The Defendant does not challenge the restitution order or the fines.

Id. at 191 (emphasis added). While Overton does discuss the possible motivation of the legislature for enacting the statute, its language does not limit the types of “victims” for the purposes of sentencing to property owners or money lenders. See id. The statute itself merely makes it a crime to misapply contract funds; it does not set forth who may be considered a “victim” for the purposes of sentencing. See Tenn. Code Ann. § 66-11-138. Moreover, the Defendant ignores the language of the supreme court in Daugherty that the statute “is intended to make the payments to the contractor trust funds for the payment of labor and materials.” Daugherty v. State, 393 S.W.2d 739, 741 (Tenn. 1965). This language would indicate that the statute contemplates that more persons than the property owners or money lenders could be harmed by a contractor’s actions in misapplying funds.

This Court has determined that the term “victim” as used for purposes of sentence enhancement “is limited in scope to a person that is injured, killed, had property stolen, or had property destroyed by the perpetrator of the crime.” State v. Raines, 882 S.W.2d 376, 384 (Tenn. Crim. App. 1994). The Defendant does not dispute that the hotel was a victim in this case because it was the property owner, and it ultimately had to pay APAC Paving to release the lien APAC had filed against the property because of the Defendant’s failure to pay the company. However, we believe that Joseph Janos and Buddy Ogles, the other two subcontractors who never received payment from the Defendant, were victims as well because they were directly harmed as a result of the Defendant’s actions. While the subcontractors performed work for the Defendant, they did not receive compensation for their work, even though the hotel paid the Defendant. Although they each received a civil judgment against Quality Unlimited, they had been unable to collect the money owed to them. Mr. Janos testified that he was forced to close his carpet business, and he suffered marital problems as a result of the Defendant’s crimes. Thus, we find no error on the part of the trial court for applying this enhancement factor.

The Defendant also takes issue with the application of enhancement factor (6), that the “personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great.” Tenn. Code Ann. § 40-35-114(b). He asserts that this factor should not apply because there was no evidence showing that the injuries or damages were greater than that ordinarily suffered in offenses of this nature. See State v. Embry, 915 S.W.2d 451, 457 (Tenn. Crim. App. 1995), overruled on other grounds by State v. Winfield, 23 S.W.3d 279, 283 n.5 (Tenn. 2000) (holding that this factor was not applicable because there was no evidence that rape victim suffered greater injury than that ordinarily involved in the offense). However, we note that the statute making it a crime to misapply contract funds is a Class E felony no matter what the injury, if any, to the victims. See Tenn. Code Ann. § 66-11-138. Thus, the statute does not consider the amount of loss to the victims in criminalizing the conduct. See id.; cf. id. § 39-14-105 (grading theft statute according to amount of property taken). Moreover, this Court has found the sentencing factor to be applicable when there are personal injuries other than the value of property lost or taken. See State v. Capley, No. M1999-00353-CCA-R3-CD, 1999 WL 1266334, at *4 (Tenn. Crim. App., Nashville, Dec. 29, 1999), perm. app. denied (Tenn. July 31, 2000) (applying factor in theft case when there was evidence that victim had to shut business down for three weeks, that employee could not be paid for the month following the theft, and that customers were lost because of temporary close of

business). Here, the Hampton Inn, Mr. Janos, and Mr. Ogles all suffered significant monetary losses due to the Defendant's actions. Mr. Janos testified that his loss was so great that he was forced to close his business after he met his financial obligations to others. Based on this evidence, we are unable to conclude that the trial court misapplied this enhancement factor.

Having determined that the trial court did not err by applying the two enhancement factors, we likewise determine that the trial court properly enhanced the Defendant's sentence from twelve months to eighteen months. We will now address the Defendant's contention that he should have been granted judicial diversion.

When a defendant who has not previously been convicted of a felony or a Class A misdemeanor is convicted of a misdemeanor or a Class C, D, or E felony, the trial court has the option of deferring further proceedings without entering a judgment of guilty and placing the person on probation under reasonable conditions. See Tenn. Code Ann. § 40-35-313(a)(1). If the defendant does not violate any of the conditions of probation, then upon the expiration of the probationary period, the court shall discharge the defendant and dismiss the proceedings against him or her without court adjudication of guilt. See id. § 40-35-313(a)(2). The defendant may then have the official records of the proceedings expunged. See id. § 40-35-313(b).

Whether a defendant should be granted judicial diversion is a matter within the sound discretion of the trial court, and this Court will not interfere with a refusal to grant judicial diversion if “any substantial evidence to support the refusal’ exists in the record.” State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992) (quoting State v. Hammersley, 650 S.W.2d 353, 356 (Tenn. 1983)). In determining a defendant's suitability for judicial diversion, the court must consider the following criteria:

- (a) the accused's amenability to correction,
- (b) the circumstances of the offense,
- (c) the accused's criminal record,
- (d) the accused's social history,
- (e) the deterrence value to the accused as well as others, and
- (g) whether judicial diversion will serve the interests of the public as well as the accused.

State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998). The record must reflect that the trial court has weighed all of these factors in determining whether to grant judicial diversion. Id. If the record fails to reflect the trial court's reasoning, this Court must review the evidence to “determine whether the trial court reached the correct result notwithstanding its failure to explain its reasoning.” Id.

Although not entirely clear, it appears from the record that the trial court denied judicial diversion based on the gravity of the circumstances, the Defendant's past behavior, and the Defendant's refusal to admit responsibility. The trial court specifically found that the Defendant was not a credible witness; according to the trial court, the Defendant was inconsistent in his statements, and some of his statements were completely false. The trial court felt that the Defendant's lack of

concern about those with whom he dealt was established at trial; it particularly noted the Defendant's assertion that "he would reappear in a short period of time in another business enterprise, and would be relieved of his ability to have to pay his debts by filing some form of bankruptcy."

Pursuant to our independent review of the evidence, we conclude that the trial court properly denied judicial diversion. The presentence report reflects that the Defendant is fifty-six years old, that he has been married and divorced four times, and that he has five children from three of those marriages. The Defendant reports having high blood pressure and an enlarged heart. He has been self-employed since 1997 when he and Randy Chambless formed Quality Unlimited. When Quality Unlimited experienced financial difficulties, the Defendant ceased doing business under that name. In 1998, the Defendant started another limited liability company, Eagle One Construction. Although the Defendant asserted at the sentencing hearing that he was current on his child support, the presentence report reflects that he has a child support arrearage of \$9,211.38. The Defendant has no prior criminal convictions, but the presentence report reflects that he has been arrested on several occasions. The Defendant reported that he has no assets, although he asserted that he is paying for a truck that is in his girlfriend's name, and he is paying money towards his girlfriend's credit card to repay her for loaning him money for Quality Unlimited. Most significantly, the Defendant has completely refused to accept responsibility for his actions. Although he testified at the sentencing hearing that he knew he was wrong not to pay the subcontractors, he made the following statements on the presentence report:

1st charge misappropriations of funds. As a partner in a LLC [sic] company I was the fall guy. For 2 yrs the other partner was active in signing contracts -- cks -- paying bills -- hiring labor -- a sub-contractors [sic] and was a integral [sic] part of Quality Unlimited LLC. Due to certain clients (Hampton Inn) not liking me personal [sic] I was targeted as bad guy, subsequently arrested and convicted of an act of which my partner is as liably [sic] as I am, yet he walked away (free).

We believe that the nature of the crime, the Defendant's refusal to admit responsibility, and his continued presence in the construction business outweigh any factors favoring judicial diversion. The Defendant's conviction needs to serve as a warning to those with whom he does business. It is certainly not in the best interests of public or the Defendant for his conviction to ultimately be expunged. See id. at 230. We thus find no error in the denial of judicial diversion.

The judgment of the trial court is AFFIRMED.

ROBERT W. WEDEMEYER, JUDGE